Supreme Court, U.S.
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No. 04-480

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
Petitioners,

v.

GROKSTER, LTD., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CHARLES NESSON IN SUPPORT OF RESPONDENTS

CHARLES NESSON
Counsel of Record

1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495 0957

March 1, 2005

Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*

I am a law professor who founded the Berkman Center for Internet & Society at Harvard Law School. [1] I am committed to building cyberspace as well as to understanding and studying it. I am also an audioblogger <http://cyber.law.harvard.edu/nesson/blog>, whose blog lights up as a link in a digital environment.

I speak on behalf of Fern, my spouse, an American historian. Historians value access to authentic searchable contemporaneous records of the past.

I speak on behalf of my son-in law, Wayne Marshall, who is an ethnomusicologist researching the roots of contemporary hip-hop music. <http://wayneandwax.blogspot.com/>

SUMMARY OF ARGUMENT

This case threatens to deny scholars access to essential materials in cyberspace. Digital libraries of non-infringing works cannot and will not be built while uncertainty in the law leaves them vulnerable to litigation for copyright infringement.

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[1] No counsel for any party contributed to the writing of this brief, and no person or entity other than *amicus curiae* made a financial contribution to its preparation. *Amicus is* informed that all parties have consented to the submission of this brief and that their letters of consent are on file with the Court.

ARGUMENT

P2P solves a problem of the Net. Suppose you are a creator in the Net, with access to cyberspace through a tiny node. You create and blog a set of bits (text, audio, or video) which catches fire as a focus of mass global attention. What happens?

Bang! Your fuse blows. Your site is overwhelmed with hits. You have made your tiny node the target of a self-created DOS Attack. You are down -- flow of your message terminated. See e.g., Tiny Takeoff on Christo Proves Gateway to Glory, Boston Globe, February 25, 2005 ("After he posted photos on his website of his 13-gate installation made from stuff he picked up at Home Depot that he glued together and painted orange Hargadon [Hargo] received more than 4 million hits, so many that he had to take it down yesterday because his Internet service was charging him for every visit. He owes thousands, he says.")

P2P can solve this problem. P2P enables a single node to spread its digits far and wide, without being overwhelmed. This is the substance of freedom of speech in cyberspace, a kind of first amendment of the Net. This is media democracy, every node capable of communication with every other.

When new communications technologies come in to mass hands, first uses often include porn and petty crime. So it has been with P2P. But with passage of time ordinary

people learn to use the new capabilities. Blogspace is now exploding with expressive non-infringing creativity.

The principle of *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984), establishes Law's openness to the future. It calls for gauging the utility of new technology not merely as a function of current disruption of established interests but according to future uses not yet necessarily evolved. The question before the Court, at least in one form, is whether the protection of the Sony Principle should be qualified to require digital libraries to filter for copyrighted material.

Suppose the Berkman Center were to build a digital library -- a data base into which creators around the globe are invited to deposit non-infringing creative works, text, audio and video. And suppose the Berkman Center were to facilitate distribution of any and all deposited works using p2p technology. The data base gives each item a permanent address; p2p allows near costless distribution.

What would be the liability of the Berkman Center as regards copyright infringement? Would the general counsel of Harvard approve such an undertaking? He will worry that copyrighted material will be deposited in the base, and that someone will download the copyrighted work from the base, thus risking liability for Harvard as a copyright infringer. He will veto the project unless he is reassured. Is an answer possible which would allay the general counsel's fear sufficiently to lead him to approve?

If the entity housing the library is held legally responsible for filtering out all infringing material, and is liable for any failures of its filtering effort, then such libraries will never be built. Yet without such libraries the historians, ethnomusicologists and other scholars of the future will be disadvantaged, and the quality of our knowledge of our past compromised.

This Court should apply the Sony Principle to the case currently before the Court in a manner that makes clear that digital libraries designed for the purpose of storing and freely distributing non-infringing work are free of the threat of litigation for copyright infringement, even if some users deposit and others download infringing works.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Charles Nesson
Counsel of Record
1575 Massachusetts Ave.
Cambridge, MA 02138
(617) 495 0957

March 1, 2005

Counsel for *Amicus Curiae*